

North Electric Company, Plant No. 10, Gray, Tennessee and Communications Workers of America. Case 10-CA-13000

July 30, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

A representation election was conducted on October 6 and 7, 1976, pursuant to the Board's Decision, Order, and Direction of Second Election.¹ The tally of ballots showed 682 votes for, and 679 against, the Union, with 5 void and 2 challenged ballots. Respondent filed timely objections to conduct affecting the results of the election, alleging in substance that union supporters threatened employees and that the Union made material misrepresentations on the eve of the election, a time when Respondent was unable to reply effectively.² The Regional Director for Region 10 conducted an investigation and, on November 12, 1976, issued his Report on Objections in which he recommended that Respondent's objections be overruled and the Union be certified. On April 1, 1977, the Board adopted the Regional Director's Report on Objections and certified the Union.

Subsequently, by letter dated April 4, 1977, the Union requested that Respondent meet for purposes of collective bargaining. Respondent refused to bargain with the Union, contending that the Union was improperly certified. Thereafter, the Union filed unfair labor practice charges. The Board, in its Decision and Order,³ found that all issues raised by Respondent, save for an alleged affirmative defense concerning its misrepresentation objection, were considered and resolved in the underlying representation case. Respondent's alleged affirmative defense was found to be without merit. The Board therefore granted the General Counsel's Motion for Summary Judgment, found that Respondent unlawfully refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, and ordered it to bargain upon request.

On March 26, 1981, the United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's Order and remanded the case to the

Board.⁴ Following its reasoning in *Prestolite Wire Division v. N.L.R.B.*, 592 F.2d 302 (1979), and *N.L.R.B. v. Curtis Noll Corporation, Curtis Industries Division*, 634 F.2d 1027 (1980), the court held that it is an abuse of discretion for the Board to adopt the report of the Regional Director without reviewing the documentary evidence relied on by the Regional Director. The court held that Section 102.69(g) of the Board's Rules and Regulations, Series 8, as amended,⁵ requires the Board to review all the documentary evidence relied on by the Regional Director in his disposition of election objections in cases in which there is only an administrative investigation and no hearing. The court further held that it is the Regional Director's responsibility to transmit the record, as defined in the first sentence of Section 102.69(g), to the Board for such review.

The court remanded the case to the Board for reconsideration of the Regional Director's report in light of the documentary evidence in the record. The court declined to order the Board to conduct a hearing because Respondent's objections do not, on their face, raise material factual disputes. Instead, the court left it to the Board to determine whether the objections, when reviewed with the documentary evidence in the record, require a hearing.

On August 4, 1981, the Board accepted the court's remand. Subsequently, Respondent filed a statement of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have reviewed the entire Regional Office file in the representation proceeding and have reviewed the documentary evidence relied on by the Regional Director, as well as witness statements submitted to the Board by Respondent.⁶ As discussed below, we affirm the Regional Director's overruling of Respondent's objections and the Certification of Representative.

Respondent's objections concerning alleged threats to employees are as follows:

1. Employees who openly supported the Employer prior to the election were threatened that property of theirs would be damaged

¹ 225 NLRB 1114 (1976), enf'd. 588 F.2d 213 (6th Cir. 1978).

² Respondent's allegation that the Board agent improperly refused to count a ballot as challenged was rejected by the Regional Director on the grounds that Respondent failed to file a timely objection to the Board agent's conduct and that, assuming a timely objection, the ballot revealed a clear intention on the part of the voter.

³ 240 NLRB 220 (1979).

⁴ *N.L.R.B. v. North Electric Company, Plant No. 10*, 644 F.2d 580.

⁵ The Rules and Regulations have since been revised.

⁶ Respondent did not submit a copy of employee Wilcox's affidavit obtained by the Regional Director during the investigation of the objections. We accept as the law of the case the court's instruction to review this affidavit, but note that it continues to be the Board's policy that affidavits independently acquired by a regional director during the investigation of objections are confidential and are not part of the record.

or destroyed if they came to work and voted in the election.

2. Employees who openly supported the Employer prior to the election were threatened that their homes would be burned down if they came to work and voted in the election.

3. Employees were threatened that their homes could be burned down if they did not vote for the CWA Union.

4. Employees were otherwise harrassed [sic] and intimidated in their exercise of a free and unrestrained choice in the election.

Employee Mary Sanders stated in her affidavit that she received a "Vote No" badge on Monday, September 27, 1976, and wore it the remainder of the week and the following Monday and Tuesday. On or about October 4,⁷ Sanders received a telephone call at home. The caller identified himself and said he was working for the Union. Sanders could not recall the caller's name. The caller told Sanders to call the Union if she needed anything, and asked her if the plant favored the Company or the Union. After Sanders said she did not know, the caller said the Union would appreciate a "yes" vote.

On October 5, Sanders received a call from an unidentified woman who asked if she was going to vote "yes" in the election. Sanders replied she was not going to disclose her vote, whereupon the caller allegedly stated several times, "You'd better vote 'yes.'"

On the evening of October 6, the day before Sanders was scheduled to vote, an unidentified man called Sanders and asked how she was going to vote. Sanders refused to say, and asked the caller if he was working for the Union. The caller replied, "Let's say I'm working for the Union," and asked if she was going to vote "for us." Sanders again refused to say. The caller then allegedly said, "You don't want nothing to happen to your car, do you," and mentioned the make of Sanders' automobile, adding "we watch you all the time." After repeating his statement about Sanders' car, the caller told Sanders not to wear "Vote No" badges any more, and that she would "be better off not [going] to work tomorrow." Sanders stated that she did not wear her "Vote No" badge when she voted the next day because of the phone call. She also stated that after the call she telephoned two friends and told her rider the following morning.

Employee Adel Pender stated in her affidavit that she wore a "Vote No" sticker for approximately 2 to 3 hours on October 5. For the past 2 or

3 weeks Pender had been eating lunch with a group of employees, one of whom was an open union supporter. The employees discussed the Union nearly every day during lunch. On October 5, while Pender was wearing her "Vote No" sticker, the union supporter told her it was "against government rules" to be wearing a "Vote No" sticker. Pender replied she was not aware of any such rule. The union supporter then allegedly said, "Your house could be burned down if you don't vote for the Union." In response, Pender asked if that "was the kind of people we need to represent us." Pender stated in her affidavit that she repeated the house-burning remark to a woman in her department and to two employees from other departments. Pender, in an earlier statement, asserted that she reviewed her homeowner's insurance policy after the October 5 discussion.

Pender also stated in her affidavit that several days prior to October 5 she received a telephone call from a Mr. Buchanan who stated he worked for Bristol Telephone. The caller answered Pender's questions about the Union and asked her how she was going to vote. Pender replied that she was undecided. The caller said if Pender had any more questions she could call him at home or at the office.

Employee Mary Lou Wilcox stated in her affidavit that she had been on medical leave since August 24. On October 5 she was called by an unidentified man who told her that, since she was on a leave of absence, she would not be eligible to vote in the election. The caller also stated that Wilcox would not have a job when she returned. On the following day, Wilcox called her general foreman who told her she could vote and informed her of the voting hours. Wilcox, who in an earlier statement placed the anonymous phone call on October 6, voted on October 7.

The Regional Director found that there was no evidence that the unidentified callers or the union supporter involved in the alleged threats were agents of the Union. Assuming, *arguendo*, that the threats occurred as alleged, the Regional Director found that the nature of the conduct was insufficient to create a general atmosphere of confusion and fear of reprisal for failing to vote for or support the Union. We agree. Our review of the record shows that the alleged objectionable conduct was not attributable to the Union nor was it of such a character to result in an atmosphere of fear and coercion. Furthermore, the evidence does not reveal the existence of substantial and material factual issues which would require a hearing.

Respondent's objection alleging material misrepresentations by the Union is as follows:

⁷ All dates are in 1976 unless otherwise indicated.

Material misrepresentations of fact were made by the Union in an election eve communication wherein it was indicated that large numbers of named employees had been unfairly terminated or laid [sic] off and not recalled because of their lack of union representation wherein the facts were such list of employees included:

- (a) former employees who were deceased;
- (b) employees who had, in fact, been recalled to work;
- (c) employees who had never been laid [sic] off or terminated from the employment of the Employer;
- (d) employees who had voluntarily quit; and
- (e) employees who refused recall to work from layoff.

The communication referred to in the objection is a four-page letter from the Union to Respondent's employees dated October 4. The cover page of the letter contains a reprint of an article that appeared in the October 1 edition of the Kingsport Times. The article, which describes the upcoming election at the Company, reports that Union Representative Calvin Patrick "charged that the Company padded its payroll before the last election and that there would be more layoffs after next week if the Union does not win." The article further reports that Patrick "said he has had phone calls from 175 persons who have been laid off and not rehired even though the Company has hired some 206 new employees since the last election." At the top of the cover page, written in red, is "What North Really Thinks of *You*," with a red arrow pointing to a circled portion of the newspaper article. The circled paragraphs of the article read as follows:

Duncan [Respondent's manager of industrial relations] responded to the Union's charges by saying there was "no truth" to the layoff rehiring figures being bandied about by the CWA.

"I'm sure during the last 10 years there are some who have not been rehired for many reasons, but at present, we have no one on lay-off who is eligible for recall."

Prior to the 1974 election defeat for the CWA, North Electric did hire "some new employees," but this was because of "business conditions" and not to "pad the payroll" so a Company win would be assured, Duncan said.

Written in red, to the right of the circled paragraphs, is "Look at the attached list of employees who have passed out the door since October 11, 1974, and *Decide for Yourself* ! Without a union,

they had no one to speak for them!" The list, which comprises the remaining 3 pages of the letter, contains approximately 1,080 names.

Respondent claims that, of the approximately 1,080 names on the list, 210 were employees who voluntarily quit, 40 were never laid off or terminated, 46 were recalled or rehired from layoff, 67 were recalled but refused reemployment, 3 are deceased, and 1 has no record of employment.

In support of this objection, Respondent submitted other union communications pertaining to the layoff/recall issue. A leaflet distributed September 14 states in relevant part:

We have received many telephone calls from persons on lay-off who had more than 3 years service, were hurt on the job and now the company refuses to take them back to work. Others have called saying they are not being called back even though they had seniority, but were laid off because of the so-called family of skills. Now the company doesn't need them.

Hundreds of employees who were working when CWA started our campaign in March of 1974, do not work at North any more. We told you then that North would hire hundreds of employees to defeat the Union and then those employees would be laid off after the election. *IT DID HAPPEN*. During that campaign, North said that the new employees could only have job security through the company and not with CWA. Look around you. How many of those employees hired in 1974 are being called back to work? *WE NOW PREDICT AGAIN*, that the company with knowledge of this up-coming election has again hired *NEW EMPLOYEES*. They will be laid off after the election, just like before. I believe the word is out and this time new employees will vote *YES* for CWA and themselves. Then, after the election, they will be able to keep their jobs, because of the job security provided by your CWA contract.

On September 24, the Union mailed to employees a letter in which a former employee described her hiring, layoff, and lack of recall. The letter refers to relatives and a friend who were also laid off and not recalled. The letter concludes with the following:

CWA told us in 1974 North would lay us off, after the election, and not recall us. I didn't think too much about it then, but now I know they were right.

If the new employees vote against the Union they will go out the door just as we did.

The only way employees can have job security is by voting in the union.

An October 1 letter to employees begins with the following relevant paragraphs:

Over 1,500 names that were on North's payroll when we started our first campaign on Marcy [sic] 1, 1974, are *NO LONGER WORKING* at North Electric.

We know that some quit, some married, changing their names, some were terminated but *HUNDREDS HAVE NOT BEEN RECALLED TO WORK*.

CWA has received over 175 calls from former employees who have not been rehired. There must be several hundred more. Just look around you. Every person in the plant knows at least one person who has not been recalled.

North has said that only the company can give job security. CWA agrees with North that the economy and sales are the primary security that management enjoys, yet, 1,500 employees *PASSED OUT THE DOOR* never to enter again (even to get a reasonable explanation from Mr. Runyan for their termination). He has even refused to talk to most of them on the telephone. Is this fair? Is it morally right to treat employees, who were loyal to the company for more than 6 years, this way? Can you feel secure knowing that without a Union this can happen to you?

Right now, some of you know younger people who [sic] the company has hired, yet in the same family, there are older, former loyal employees who are on layoff. Think about that for a moment—Do you feel *former employees have job security*?

Other communications issued by the Union during the organizing campaign discussed the increased job security a union contract would afford. These handbills and letters specifically referred to the layoff/recall issue, and asserted that seniority provisions in a union contract would provide employees with increased job protection.

The Regional Director overruled this objection on the ground that the Union's election eve communication did not involve a substantial departure from the truth. He found that the layoff/recall issue was an integral part of the Union's organizing campaign, and that the Union's October 1 letter to employees acknowledged that some employees no longer working at the Company had quit, changed their names, or were terminated. He also noted that the newspaper article appearing on the cover page of the October 4 letter sets forth Respondent's re-

sponse to the Union's claim that new employees were hired while former employees remained on layoff.⁸

Respondent contends that throughout the 1976 election campaign the Union asserted that the Company had unjustly discharged hundreds of employees since the first election. It argues that the Union's election eve mailing of the list of employees who had "passed out the door" conveyed a sense of corroboration of the Union's theme of unfair discharges, and that, in this context, the substantial factual inaccuracies contained in the October 4 letter interfered with the employees' free choice.

We agree with the Regional Director's overruling of the objection.⁹ The documentary evidence shows that the issue of job security was frequently addressed by the Union during the organizing campaign. In particular, the Union claimed that many individuals employed at the Company during the first campaign were no longer working at North and had not been recalled to work. The Union attributed this situation to Respondent's tactic of hiring employees to defeat the Union and then laying them off after the election. The Union "predicted" the Company had again hired new employees who would be laid off after voting in the 1976 election.

The Union elaborated on the layoff/recall issue in its October 1 letter to employees, claiming that 1,500 employees were no longer working, or had "passed out the door," since the first campaign. The letter admits that "some quit, some married, changing their names, some were terminated," but asserts that "hundreds have not been recalled to work." Thus, the Union clearly was not claiming that all of the 1,500 employees who had "passed out the door" had been discharged and denied recall as part of Respondent's alleged election strategy.

Further, it is apparent from the face of the October 4 letter that the "list of employees who have passed out the door since October 11, 1974" was distributed to refute Respondent's comments in the accompanying newspaper article that "at present, we have no one on lay-off who is eligible for recall." As understood in light of the Union's October 1 letter, the October 4 list of names was offered

⁸ In its Decision and Order of January 25, 1979, the Board found that Respondent's misrepresentation objection was properly overruled under the standards of *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), reaffirmed in *General Knit of California, Inc.*, 239 NLRB 619 (1978). Then Member Penello relied on *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

⁹ Chairman Van de Water concludes that the objection is without merit under the standards of either *Shopping Kart, supra*, or *Hollywood Ceramics, supra*.

for the employees' consideration in evaluating the plausibility of Respondent's layoff/recall statement. Viewed in this context, Respondent's accounting for the status of 367 of the 1,080 names on the list fails to establish that the October 4 letter involved a substantial departure from the truth.¹⁰

Having confirmed the validity of the election in Case 10-RC-10126, we hereby affirm the Certifica-

tion of Representative issued therein, and we hereby affirm our Order in Case 10-CA-13000.¹¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board affirms its Decision and Order issued in this proceeding on January 25, 1979 (reported at 240 NLRB 220), and hereby orders that the Respondent, North Electric Company, Plant No. 10, Gray, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth therein.

¹⁰ We further find that Respondent's objection, considered with the documentary evidence in the record, does not raise substantial and material factual issues warranting a hearing.

¹¹ 240 NLRB 220.